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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, Secretary of the Interior, and JAMES T. McINTYRE, JR., Director, Office of Management and Budget,
Petitioners,

v.

SIERRA CLUB, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] A, pp. 1a-48a) is reported at 581 F.2d 895. The opinion of the district court (Pet. App. B, pp. 49a-58a) is reported at 395 F.Supp. 1187.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, pp. 59a-60a) was entered on May 15, 1978. On August 7, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari until October 12, 1978.

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[1] "Pet." and "Pet. App." refer to the petition for a writ of certiorari and to the Appendix to that petition, respectively.

The petition for a writ of certiorari was filed on October 12, 1978. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. 1254(1). Pet. 2.

QUESTIONS PRESENTED

1. Whether the court of appeals correctly decided that Section 102(2)(C) of the National Environmental Policy Act requires the preparation of environmental impact statements on budget requests of federal agencies on the ground that they are proposals for legislation if the requests include new action significantly changing the status quo or propose a programmatic course based upon a programmatic review.

2. Whether the court of appeals correctly decided that the Office of Management and Budget is required by Section 102(2)(B) of the National Environmental Policy Act, which applies to all federal agencies, to issue methods and procedures which will identify the budget requests requiring an environmental impact statement.

STATUTES INVOLVED

The relevant provisions of the Budget and Accounting Act of 1921, 31 U.S.C. 1, *et seq.*, are set out at Pet. 3-4. The relevant provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.*, are set out at Pet. 5.

STATEMENT

1. Section 201(a) of the Budget and Accounting Act of 1921, 30 U.S.C. 11(a), provides that "[t]he President shall transmit to Congress during the first fifteen days of each regular session, the Budget * * *." Under Section 201(a)(5), 30 U.S.C. 11(a)(5), the Budget is to include the "estimated expenditures and proposed appropriations

necessary in his judgment for the support of the Government for the ensuing fiscal year * * *."

Preparation of the Budget is the responsibility of the Office of Management and Budget (OMB), which is an independent office in the Executive Office of the President (see Executive Order 11541, 35 Fed. Reg. 10737 (1970)). Section 207 of the Budget and Accounting Act, 31 U.S.C. 16, provides that "[t]he Office [of Management and Budget], under such rules and regulations as the President may prescribe, shall prepare the Budget, and any proposed supplemental or deficiency appropriations, and to this end shall have authority to assemble, correlate, revise, reduce, or increase the requests for appropriations of the several departments or establishments." Section 215 of the Act, 30 U.S.C. 23, directs the head of each department and establishment to "submit his requests for appropriations to the Office of Management and Budget on or before a date which the President shall determine."

To fulfill its responsibility to prepare the Budget, OMB forwards to the various departments overall budget figures to guide their budgeting. See Pet. App. E, p. 65a; Pet. App. F, p. 74a. Agency budget recommendations are then forwarded to OMB which reviews them. See Pet. App. E, p. 65a. OMB staff identifies areas where changes in program policy or funding policy are required and, on the basis of these changes, establishes "[a]lternative courses of action and their effects" which are discussed with the Director of OMB. Pet. App. E, p. 65a. The Director then forwards budget alternatives to the President. See *id.* at 66a; Pet. App. F, p. 77a. The President determines which alternatives to place in the Budget and, after informing the department heads of his decisions, forwards his recommended Budget to Congress. *Ibid.*

2. In their complaint, respondents challenged the failure of the Department of the Interior and OMB to prepare

an environmental impact statement (EIS) on their annual budget proposals for the National Wildlife Refuge System. Respondents contended that those proposals are both "recommendation[s] or report[s] on proposal[s] for legislation" and "other major federal action[s]" which significantly affect the quality of the human environment within the meaning of Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C).[2] Respondents also contended that Section 102(2)(B) of NEPA, 42 U.S.C. 4332(2)(B), which requires agencies to identify and establish procedures to insure that environmental values are given appropriate consideration in decisionmaking, required OMB to establish procedures to assure that budget proposals significantly affecting the quality of the human environment would be accompanied in the budget process by an environmental statement.

3. The district court granted summary judgment for respondents. It held that annual proposals for financing the National Wildlife Refuge System are both "proposals for legislation within NEPA" and "major Federal actions which clearly have a significant effect on the environment." Pet. App. B, p. 51a. The court therefore declared that NEPA required the petitioners to "prepare, consider, and disseminate environmental impact statements on annual proposals for financing the National Wildlife Refuge

[2] Respondents did not argue that both the Department of the Interior and OMB had to prepare an environmental statement. Rather, they contended that, as in other situations where more than one federal agency proposes or is involved in an environmentally signigcant action, one of the petitioners was required to assume the role of the lead agency and thereby the major responsibility for the preparation of the statement. See the Council on Environmental Quality (CEQ) regulations and guidelines on NEPA 40 C.F.R. 1501.5 (43 Fed. Reg. 55992, November 29, 1978); 40 C.F.R. 1500.5(a)(1), 1500.7(b) (1977). Respondents suggested that here the Department of the Interior would be the likely lead agency and thus would prepare the environmental statement which would be considered by OMB and the President and ultimately transmitted to Congress with the President's Budget.

System."[3] Pet. App. D, p. 61a. In addition, the district court declared that NEPA require OMB to "develop formal methods and procedures which will, with respect to the Office's own administrative actions and proposals, identify those agency actions requiring environmental statements to be prepared, considered, and disseminated." *Id.* at 62a.

4. The court of appeals reversed the district court's judgment which required petitioners to prepare an environmental impact statement each year on the operations of the National Wildlife Refuge System. Pet. App. A, p. 23a. Although the court held that petitioners' requests for appropriations for the Refuge System were "proposal[s] for legislation" under Section 102(2)(C) of NEPA (*id.* at 14a, 18a), it concluded that an environmental statement was not required each year on those proposals. Instead, it narrowly defined two situations in which NEPA required the preparation of an EIS on agency budget proposals: where a proposal calls for "taking new action which significantly changes the status quo * * *" and where a proposal "ushers in a considered programmatic course following a programmatic review."[4] *Id.* at 17a.

[3] After respondents filed their complaint in the district court, the Department of the Interior decided to prepare an enviornmental impact statement on "the entire operation and administration of the Refuge System, including funding alternatives." Pet. App. B, p. 57a. However, the district court held that that statement did not satisfy petitioners' obligation under NEPA to prepare an annual environmental impact statement on the budget proposals for the Refuge System since it principally provided "an overview of the Refuge System and will only secondarily emphasize the environmental impacts * * * of the budget requests" and would not be regularly updated. *Ibid.*

[4] In light of the EIS which the Department of Interior had prepared, the court ruled that the Department had no further obligations under NEPA at that time. *Id.* at 23a.

The court of appeals affirmed the district court's declaratory judgment that, under Section 102(2)(B) of NEPA, OMB was required to develop methods and procedures which would identify agency requests for appropriations that require an environmental impact statement. Pet. App. A, p. 20a. It required OMB to review its current procedures governing the budget process and "to revise them if necessary to conform to its views of what NEPA requires, consistently with this opinion." *Id.* at 21a n.37. In this regard, the court emphasized that "OMB will have latitude to develop methods and procedures that harmonize both NEPA and budget processes." *Id.* at 23a.

REASONS FOR DENYING THE WRIT

1. Petitioners seriously exaggerate the novelty and importance of the decision below.

Contrary to petitioners' assertion (Pet. 15), the court of appeals' decision is not the "first significant judicial intervention in the processes of the Executive Branch that culminate in the President's annual submission of his Budget to Congress." In at least three earlier cases, courts have held that agency budget requests are "proposals for legislation" under Section 102(2)(C) of NEPA. *Scientists' Institute for Public Information* v. *AEC*, 481 F.2d 1079, 1088 (C.A.D.C. 1973); *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164, 1182-1184 (C.A. 6, 1972); *Aluli* v. *Brown*, 437 F. Supp. 602, 606-607 (D. Haw. 1977), appeal pending. The court of appeals' decision therefore is merely another in a line of decisions holding that NEPA requires the preparation of environmental impact statements on agency requests for appropriations which significantly affect the human environment.[5]

[5] Even if a budget request does not constitute a "proposal for legislation," as the dissent below concluded (see Pet. App. A, p. 30a-42a), an EIS would still have to be prepared, as the district court held (Pet. App. B, p. 51a), whenever the request "significantly affect[s] the quality of the human environment" since Section 102(2)(C) of NEPA applies not only to "proposals for legislation" but also to "other major Federal actions."

In addition, contrary to petitioners' argument (Pet. 15), the court of appeals' decision will not result in any appreciable, let alone "significant," judicial intervention in the budget process. The court's decision narrowly defines the situations in which an environmental impact statement is required on an agency budget proposal. An EIS is required only where an agency's proposal involves new action which significantly changes the status quo of an existing program or where an agency has carried out a review of a program and has determined the course the program is to take in the future. Pet. App. A, p. 17a. The court observed that environmental statements on budget proposals would, under the principles it established, be required "in relatively few instances." *Id.* at 22a.

Moreover, even if environmental impact statements are not required on the budget proposals identified in the court of appeals' decision, EISs on the proposals will often be nonetheless required at a later time on the actions underlying the budget proposals. For instance, in the case of a proposal to alter significantly the status quo of an agency program, an EIS will be required after the agency obtains appropriations from Congress when it decides whether to undertake the action that was proposed in its budget request. At that time, the agency's proposal to alter the status quo in an environmentally-significant manner would constitute a proposal for a "major Federal action" under Section 102(2)(C) and an EIS would have to be prepared. Similarly, in the case of an agency review of a program which significantly affects the human environment, an EIS would be required

on the agency's new, post-review "programmatic course" (see Pet. App. A, p. 17a).[6] And an environmental statement would be required whenever the agency seeks new authorization for the program from Congress.[7]

Consequently, the court of appeals' decision does not impose any substantial burden. It primarily affects the time at which environmental impact statements on certain proposed actions are to be prepared. Under the court's decision, statements on a narrow class of environmentally-significant proposed actions are to be prepared during the budget process, rather than after the agency obtains appropriations when it decides whether to undertake the action. The decision thus allows the environmental effects of a small number of proposed agency actions to be considered not only by the various components of the Executive Branch which are involved in the budget process but also by Congress in its budget deliberations. This, we submit, is entirely consistent with the NEPA requirement that the environmental consequences of proposed agency actions be considered "at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs." *Calvert*

[6] The Department of the Interior prepared on environmental impact statement in precisely this situation when it prepared an EIS in conjunction with its programmatic review of the National Wildlife Refuge System. See note 3, *supra*.

[7] Judge MacKinnon, in dissenting from the majority opinion below, recognized that NEPA requires impact statements on agency proposals for "legislation authorizing appropriations, *i.e.*, [for] alterations in the existing law * * *." Pet. App. A, pp. 41a-42a. Courts have held that NEPA requires environmental statements on proposals for legislation, other than for appropriations, which significantly affect the environment. *E.g.*, *Realty Income Trust* v. *Eckerd*, 564 F.2d 447, 450 (C.A.D.C. 1977); *Atchison, Topeka, and Santa Fe Ry.* v. *Callaway*, 431 F. Supp. 722, 725 (D.D.C. 1977).

Cliffs' Coordinating Committee, Inc. v. *AEC*, 449 F.2d 1109, 1118 (C.A.D.C. 1971).

2. There is no conflict among the courts which have considered whether NEPA requires the preparation of environmental impact statements on requests for appropriations which significantly affect the quality of the human environment. As we have seen above, all three courts, in addition to the courts below, which have considered this question have held that agency appropriation requests which propose activities having significant effects on the human environment are "proposal[s] for legislation" under NEPA that require the preparation of environmental statements. No court has held to the contrary.[8]

3. The court of appeals' holding that agency requests and recommendations for appropriations, including those of OMB, are "proposals" for legislation is fully consistent with the language of Section 102(2)(C), this Court's decisions interpreting NEPA, and the Act's legislative history. Section 102(2)(C) requires all federal agencies to "include in every recommendation or report on proposals for legislation * * * significantly affecting the quality of the human environment, a detailed [environmental impact] statement * * *." It does not require an EIS only on agency legislative proposals which represent the final proposal of the Executive Branch. Rather, an EIS is required on any such proposal which would significantly affect the environment, irrespective of the entity to which it is forwarded or which makes a final determination on

[8] Petitioners cite (Pet. 15 n.11) *Sierra Club* v. *Department of the Interior*, 424 F. Supp. 172 (N.D. Cal. 1976), and *National Wildlife Federation* v. *United States*, Civil No. 78-1039 (D.D.C. July 20, 1978), appeal pending, for the proposition that "courts have refused to impose procedural conditions on reporting or disclosure requirements on the budget-making process." However, neither case involved NEPA and its explicit requirement that all federal agencies prepare environmental impact statements on proposals for legislation having significant environmental effect.

it.[9] Thus, despite the fact in this case that the Department of the Interior's budget proposals are forwarded to OMB and OMB's proposals are subject to the review of the President, both the Department and OMB are agencies whose recommendations for appropriations are, under Section 102(2)(C), "proposals" for legislation.[10]

Contrary to petitioners assertion (Pet. 17), this conclusion is in no way inconsistent with the decisions of this Court interpreting NEPA. In *Kleppe* v. *Sierra Club*, 427 U.S. 390, 399, 401-402 (1976), this Court held that Section 102(2)(C) requires an environmental impact statement only on actual proposals for legislation or other

[9] The court of appeals properly rejected the contention now made by Petitioners (see Pet. 16-18) that agency budget proposals are not "proposals" for legislation under Section 102(2)(C) because they do not constitute the Executive Branch's final budget proposal (Pet. App. A, p. 22a):

> Certainly the fact that a proposal is subject to further review by the Executive is no bar to NEPA's requirement for an environmental statement. On the contrary, NEPA calls for an EIS precisely so that environmental consequences may be taken into account before a final decision is reached by the Executive official or agency.

The CEQ regulations and guidelines on NEPA have consistently recognized that an agency's proposal for legislation or other major action is a "proposal" under Section 102(2)(C) even though a final decision on it is to be made by another agency. See 40 C.F.R. 1501.5 (43 Fed. Reg. 55992; November 28, 1978); 40 C.F.R. 1500.7 (b) (1977).

[10] OMB is clearly an "agency" under Section 102(2)(C) of NEPA when performing its duties in the budget process. Congress has specifically charged OMB with the responsibility of preparing the Budget. Section 207 of the Budget and Accounting Act, 31 U.S.C. 16. Consequently, in the budget process, OMB does not perform merely as staff to the President. It therefore is an agency under the Administrative Procedure Act and the Freedom of Information Act. See *Soucie* v. *David*, 448 F.2d 1067 (C.A.D.C. 1971); *Gulf Oil Corp.* v. *Hickel*, 303 F. Supp. 31 (D.D.C. 1969), affirmed, 435 F.2d 440 (C.A.D.C. 1970); *Guadamuz* v. *Ash*, 368 F. Supp. 1233 (D.D.C. 1973); *Amalgamated Meat Cutters & Butcher Workers* v. *Connelly*, 337 F. Supp. 737 (D.D.C. 1971). And there is no evidence in the legislative history of NEPA that Congress intended OMB to be treated otherwise under that Act.

federal action. Thus, this Court ruled that where an agency has not formulated a proposal or is merely contemplating whether to do so, Section 102(2)(C) is inapplicable. 426 U.S. at 406. However, when an agency submits budget recommendations to OMB, it is not merely contemplating a proposal. To the contrary, the recommendations represent the agency's final position on a proposal for legislation after months of detailed analysis and review. See Pet. App. F, pp. 74a-77a.

If agency budget proposals are not "proposal[s]" for legislation under Section 102(2)(C) because they do not constitute the Executive Branch's final proposal to Congress, then any agency proposal for environmentally-significant legislation would be exempt from NEPA whenever the final proposal was submitted to Congress by the President. However, there is nothing in NEPA or its legislative history to indicate that Congress, after specifically providing that legislative proposals were to be covered, intended such a broad exemption from the requirements of Section 102(2)(C). In addition, the CEQ regulations provide that, in determining whether a proposal for legislation is a "proposal" under Section 102(2)(C), the controlling factor is not the entity which ultimately submits the proposal to Congress but the role of the federal agencies in developing it. 40 C.F.R. 1508.17 (43 Fed. Reg. 56004, November 29, 1978). If a proposal is developed by or with the significant cooperation and support of a federal agency, it is a "proposal for legislation" under Section 102(2)(C), regardless of the entity which transmits it to Congress. *Ibid.*[11]

[11] The CEQ guidelines on NEPA provide that agency requests for appropriations were proposals for legislation under Section 102(2)(C). 40 C.F.R. 1500.5(a) (1977). That interpretation of CEQ, the agency charged with administering and implementing NEPA, is of course entitled to great weight (*Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)), particularly since it was made soon after the enactment of NEPA (*Power Reactor Development Co.* v. *International*

4. There is absolutely no evidence in the legislative history of NEPA that Congress intended to exclude appropriations from the term "legislation" in Section 102 (2) (C). None of the courts which has addressed the question whether NEPA requires environmental impact statements on an agency budget proposal has concluded that Congress intended to distinguish between "appropriations" and "legislation" in Section 102(2) (C). As then Judge McCree stated for the Sixth Circuit in *Environmental Defense Fund* v. *TVA*, *supra*, 468 F.2d at 1181:

> Appellants claim * * * that there is a distinction between "legislation" and annual appropriations for purposes of construing section 102(2) (C). They urge that the former refers to a change in existing law but the latter constitutes merely a routine authorization to disburse funds[,] * * * that the standing rules of both the House of Representatives and the Senate embody this distinction and that it can be assumed that Congress was aware of the distinction when it approved the use of the word "legislation" in section 102(2) (C). * * *
>
> We find this contention unconvincing. * * *. More significantly, the Congress may have valid reasons for distinguishing between "legislation" and "appropriations" for purposes of determining procedural

Union of Electricians, 367 U.S. 396, 408 (1961)). The new CEQ regulations provide that requests for appropriations are not proposals for legislation under Section 102(2)(C). 40 C.F.R. 1508.17 (43 Fed. Reg. 56004, November 29, 1978). In support of its change in position, CEQ merely referred to "traditional concepts relating to appropriations and budget cycle" and "considerations of timing and confidentiality" and concluded that "[q]uite simply, the Council in its experience found that preparation of EISs is illsuited to the budget preparation process." 43 Fed. Reg. 55989 (November 29, 1978). But what CEQ considers unwise or impractical is of little relevance to the question whether Congress intended agency requests for appropriations to be proposals for legislation and, where significantly affecting the environment, to be accompanied by an EIS.

> matters such as deciding the proper committee to which to refer a bill or the time or duration of legislative debate. But that does not require us to close our eyes to the commonly accepted meaning of the word "legislation"—the making or giving of laws—or to the clearly expressed congressional purpose of NEPA.

5. Petitioners rely heavily (see Pet. 18-20) on the contention that Congress intends the budget process to be confidential. However, Section 206 of the Budget and Accounting Act, 31 U.S.C. 15, merely instructs agencies not "to submit to Congress or any committee thereof" any estimate or request for appropriations unless requested by either House of Congress. Congress has not restricted the disclosure of agency budget requests in any other fashion.[12]

Even if Congress intended Section 206 of the Budget and Accounting Act to establish a general rule of confidentiality governing agency budget proposals, this would not support a general exemption of those proposals from the requirements of NEPA. To the contrary, in Section 102(2) (C) Congress required all agencies, "to the fullest extent possible," to prepare environmental impact statements on environmentally-significant proposals for legislation. Numerous courts, including this Court, have held that, in requiring agencies to comply with NEPA "to the

[12] OMB Circular A-10 requires that agencies not disclose their budget requests prior to the submission of the Budget to Congress. However, there is no evidence that in enacting NEPA, Congress intended OMB's policy of confidentiality to negate the clear mandate of NEPA that agency proposals which significantly affect the environment be fully analyzed and publicly disclosed before final decisions are made. Moreover, the courts have held consistently that EISs are required on such proposals, despite inconsistent policies or practices of federal agencies. *E.g.*, *Calvert Cliffs' Coordinating Comm., Inc.* v. *AEC*, *supra*; *Silva* v. *Romney*, 473 F.2d 287 (C.A. 1, 1973); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F.2d 1244 (C.A. 8, 1974).

fullest extent possible," Congress intended to excuse agency compliance only where there exists a direct and unavoidable statutory conflict. *E.g., Flint Ridge Development Co.* v. *Scenic Rivers Association of Oklahoma*, 426 U.S. 776, 787-788 (1976); *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, *supra*, 449 F.2d at 1114, 1115 n.12; *Louisiana* v. *FPC*, 503 F.2d 844, 874 (C.A. 5, 1974); *Davis* v. *Morton*, 469 F.2d 593, 598 (C.A. 10, 1972).

Here, there is no statutory conflict between Section 206 of the Budget and Accounting Act and Section 102(2)(C) of NEPA even if Section 206 is construed as establishing a broad rule of confidentiality. The environmental impact statement on a budget proposal need not contain the figures which the agency is forwarding to OMB or that OMB is recommending to the President. Rather, the statement need only consider, as the court of appeals stated (Pet. App. A, p. 22a), various alternative budget figures and the environmental impacts of each.[13] Alternatively, a statement may be prepared on an agency's budget proposal and considered in the budget formulation process by the agency, OMB and the White House, but not be released to the public until the President transmits the final Budget to Congress.[14] In any event, the preparation of environmental impact statements on agency budget proposals clearly does not require the publication

[13] This is precisely the approach which was taken in the 1976 EIS prepared by the Department of the Interior on the National Wildlife Refuge System. It examined the environmental effects of managing the System over a ten-year period at various levels of appropriations. It did not disclose any budget proposals made by the Department to OMB or by OMB to the President.

[14] The new CEQ regulations provide that agencies need only prepare draft environmental statements on legislative proposals and that those statements are to be released to the public at the time the legislative proposal is sent to Congress or within 30 days thereafter. 40 C.F.R. 1506.8 (43 Fed. Reg. 56001-56002, November 29, 1978).

of the figures set forth in the proposals or otherwise compromise the alleged confidentiality of the budget process.

6. The court of appeals concluded that OMB, "as the key agency in the executive's budget formulation process," is required to provide guidance to other agencies in determining when an environmental statement is required on budget proposals. Pet. App. A, pp. 20a-22a. That conclusion is entirely warranted.

Section 102(2)(B) directs all agencies of the federal government to "develop methods and procedures which will insure that presently unquantifiable environmental amenities and values be given appropriate consideration in decisionmaking along with economic and technical consideration." The fact that Section 102(2)(C) requires environmental impact statements on agency proposals to be prepared by a responsible official of the agency making the proposal certainly does not, as petitioners argue (See Pet. 24-25), show that methods and procedures issued pursuant to Section 102(2)(B) are to be restricted to the agency that issues them. To the contrary, Section 102(2)(B) is independent of Section 102(2)(C). See *Hanly* v. *Kleindienst*, 471 F.2d 823, 834-835 (C.A. 2, 1972), certiorari denied, 412 U.S. 908 (1973). And, on its face, it does not even suggest that the methods and procedures that are developed pursuant to it are only to be applicable to the agency developing them.

Indeed, it is perfectly reasonable for OMB to prepare the guidelines called for by the court of appeals' decision. It is the agency primarily responsible for gathering budget proposals and other information from the various agencies and for preparing the Budget. See Section 207 of the Budget and Accounting Act, 31 U.S.C. 16. In fulfilling these responsibilities, it already has issued numerous regulations instructing the agencies how to proceed in the budget process. See OMB Circulars Nos. A-10 and

A-11. OMB therefore is clearly the logical agency to develop regulations implementing the court's decision.

Finally, it should be noted that the CEQ guidelines provide that OMB would perform the very role that the court of appeals directed it to assume. 40 C.F.R. 1500.12 (1977) provided that CEQ and "the Office of Management and Budget will cooperate in giving guidance as needed to assist agencies in identifying legislative items believed to have environmental significance." To our knowledge, OMB has never opposed CEQ's authority to issue this guideline or its responsibility to provide guidance to other agencies regarding their NEPA obligations.[15]

[15] While not including the issue as one of the questions presented, petitioners suggest (Pet. 26-27) that respondents lacked standing to challenge the failure of OMB to issue regulations and guidance under Section 102(2)(B). We note that, although petitioners raised other questions concerning standing below—questions which they now concede (Pet. 25-26)—they have never previously raised this issue. In any event, the injury to respondents from OMB's unlawful failure to issue regulations and guidance under Section 102(2)(B) "fairly can be traced to the challenged action" of OMB and is not "purely speculative." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42, 43 (1976). If OMB had promulgated the regulations required by Section 102(2)(B) regarding the preparation of EISs, there can be little doubt that the Department of the Interior would have complied with them and prepared an EIS on its budget proposals. Indeed, the Department would have been under a legal obligation to do so. Thus, this is not a situation like *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra,* or *Warth* v. *Seldin*, 422 U.S. 490 (1975), where there was serious doubt whether the private parties who were actually inflicting the injuries on the plaintiffs and who were not before the court would alter their practices if the relief requested against the defendants were granted.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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